93-71 (1)

NO. _____

In the

Supreme Court of the United States

October Term, 1992

ROBERT AUGUST NELSON,
JEFFREY JON HEINEN,
DAVID DANIEL HEINEN and
DATA HARDWARE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where federal law enforcement agents, who are aware of a fraud offense and could make an arrest and halt the activity, allow the offense to be repeated numerous times without intervention over a period of several months for no legitimate purpose, may the accused be sentenced on each of the cumulative offenses, or should mitigation result from the government's conduct?

II. When calculating loss for sentencing purposes in a fraud prosecution, where the defendants tendered mislabelled but valuable property in exchange for property of greater value, should the amount of loss be reduced by the value of the property tendered, or by the value of pre-indictment payment of the difference in value, or both?

PARTIES TO THE PROCEEDING

The parties appear in the caption of the case. Data Hardware, Inc., has no parent company or subsidiaries not wholly owned.

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 988 F.2d 798 (8th Cir. 1993).

JURISDICTION

The opinion of the Court of Appeals was entered on March 2, 1993, and a petition for rehearing was denied on April 12, 1993. Jurisdiction is believed to be conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

United States Constitution:

Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Sentencing Guidelines, § 2F1.1, comment (n.7(a)):

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

STATEMENT OF THE CASE

Petitioners were indicted for and convicted of conspiracy to defraud (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1341), interstate transportation of property taken by fraud (18 U.S.C. § 2314) and aiding and abetting (18 U.S.C. § 2). Jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

Data Hardware, Inc., sold, leased, serviced and modified large computers in Bloomington, Minnesota. Petitioner David Heinen was the owner and president; Robert Nelson was vice-president; Jeffrey Heinen was a courier and technician, not in management. (App. p. 7a)

Thermoconductor modules (TCMs) are small "black boxes" which contain important computer circuitry; all appear alike externally, but their values vary according to capacity and functions. The

IBM company (exclusively) sold these parts for $50,000 to $140,000 and also had a "like for like" exchange program which allowed a computer owner to obtain a replacement TCM for "immediate maintenance needs" by exchanging a failing TCM of the same type and paying $17,000. (App. p. 5a)

Each TCM had a part number identifying its type, and a unique serial number on metal labels. The petitioners took labels from certain TCMs and placed them on TCMs of lower value, which they then exchanged for new parts of types corresponding to the labels. These were used to modify or upgrade computers handled by Data Hardware. The actual value of the part returned for exchange was immaterial to IBM. The "initial" exchange price was always $17,000, but the exchange agreement provided that the

"final sales price" was "contingent upon the customer's tendered part being determined acceptable for exchange by IBM at it's (sic) manufacturing location," and IBM could bill the customer for any difference in value after the inspection. (App. p. 7a, 10a)

The exchanges were made in person, not by mail, and the exchange agreement with the $17,000 price was obtained at that time; an invoice was later mailed, and these were the mailings upon which the mail fraud charges were based. (App. p. 11a)

Because of a tip from an informant at Data Hardware, Inc., IBM and law enforcement were aware of the label switching practice from the very beginning, but the F.B.I. instructed IBM not to notify the petitioners but rather to allow the exchanges to continue. In

the period from July 15 to December 14, 1988, when a search warrant was executed, 17 such exchanges took place. Thereafter, IBM billed Data Hardware for the full value of the exchanged parts, $1.7 million, and the bill was paid. The indictments did not come until about two years later. (App. p. 41a)

At sentencing, the trial court calculated the loss simply by deducting the $17,000 exchange price of each TCM from its retail price, allowing no value for the TCMs turned in by the petitioners, even though IBM could recondition and resell these as "equivalent to new" at full price. The trial court also did not recognize the payment of the $1.7 million bill from IBM two years before the indictment. The court thus found a loss of $1,746,000 which enhanced the base offense level by nine levels under the

Sentencing Guidelines. And the court rejected the petitioners' contention that because IBM and the federal government were aware of the exchange practice from the beginning and could easily have stopped it but did not do so, instead allowing 17 transactions to take place, the petitioners were victims of what has sometimes been called (perhaps not entirely helpfully) "sentencing entrapment." (App. p. 41a-44a)

The Eighth Circuit Court of Appeals affirmed the convictions and sentences (except for a narrow question concerning the timing for payment of a fine, which is not at issue here). The court declined to follow decisions from other circuits cited by petitioners which would require the sentencing value calculation to be based upon the actual or net loss. (App. p. 36a-41a)

The court also rejected petitioners' "sentencing entrapment" argument, although it recognized with disapproval the problem posed by the government's methods:

> We are concerned with the government conduct in this case. It seems that there was no legitimate reason for this scheme to continue as long as it did. Obviously, the longer the scheme continued, the higher the losses, and the longer the sentences.

(App. p. 43a) 988 F.2d at 809.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents two important questions which have not been but should be settled by this Court, both of which recur with some frequency in federal criminal prosecutions and thus affect the fundamental rights of innumerable litigants: First, may federal law-enforcement authorities for no legitmate reason stand by and delay making arrests or otherwise intervening while a series of

offenses occurs, thus enhancing the seriousness of the conduct and the sentencing consequences? And, second, in calculating loss when imposing sentences for fraud in misrepresentation of the value of an item, should trial courts take into account the value of the item received by the victim or the value by pre-indictment restitution or both? The circuits are in conflict on the method of calculating loss.

I. THE CONSTITUTIONAL DOCTRINES OF DUE PROCESS OF LAW AND SEPARATION OF POWERS ARE VIOLATED WHEN LAW ENFORCEMENT AUTHORITIES, FULLY AWARE THAT A SERIES OF OFFENSES IS IN PROGRESS, FOR NO LEGITIMATE REASON AND OVER A LENGTHY PERIOD OF TIME ALLOW REPEATED OFFENSES TO OCCUR AND THUS GREATLY INCREASE THE GRAVITY OF THE SENTENCES TO BE IMPOSED.

It is undisputed here that from a very early date, because of the tip of an inside informer and other evidence, IBM and the federal authorities were fully

aware that these petitioners were exchanging valuable computer parts on which the labels had been switched to misrepresent their types. Yet for a period of several months they allowed this to continue, though it could easily have been stopped with no detriment to the investigation. The sole effect of the delay was to enhance the cumulative seriousness of the offenses and thus of the sentences imposed. The potential for serious abuse is apparent.

This practice is sometimes called "sentencing entrapment," but although this is descriptive in a general way it is also misleading since it incorrectly invokes the notion of "predisposition." Thus, the court below expressed its concern for the government's conduct and recognized there was "no legitimate reason" for allowing the scheme to continue, but declined to

reverse because if found no compelling showing of a lack of predisposition. App. p. 43a; 988 F.2d at 809. See also United States v. Lenfesty, 923 F.2d 1293 (8th Cir.), cert. den., 499 U.S. ____ (1991), and United States v. Stuart, 923 F.2d 607 (8th Cir. 1991) where the same court also discussed this problem recently.

But the emphasis on predisposition misses the point in several ways. First, the argument is not truly "entrapment" in the sense it is ordinarily offered as a complete defense; rather, the focus is the manipulation of sentencing factors by law enforcement agents, quite a different proposition. Second, unlike the defense of entrapment, therefore, a prohibition of the practice would not defeat a prosecution; it would merely halt a series of offenses at an earlier point, and still allow punishment of the offender. Third,

the government's conduct, or mere passivity, serve no legitimate law enforcement purpose since the goal of detecting the offense has already been met; therefore, law enforcement agents are found in the unbecoming position of witnessing crimes without taking action. (By analogy, one can hardly imagine a serial rapist or other violent offender being permitted to continue a course of assaults upon the same or other victims, but there is no fundamental philosophical difference from the perspective of law enforcement whose principal goal is to **prevent** crime.) Fourth, the evil in the practice is not that the government affirmatively creates an offense where none would have occurred but that by allowing the conduct to continue it permits and fails to prevent additional crimes for no reasonable purpose.

The catch-phrase "sentencing entrapment" would, therefore, better be discarded so that the operative considerations are not obscured.

Judge Reinhardt recognized the distinction in United States v. Dickey, 924 F.2d 840-41 (9th Cir. 1991), concurring in part and dissenting in part:

> Contrary to the reasoning of the Eighth Circuit, See United States v. Streeter, 907 F.2d 781, 787 (8th Cir. 1990), the fact that a defendant has not made out an entrapment defense sufficient to mitigate guilt does not dispose of the question whether his reluctant participation in a criminal activity should mitigate his sentence.... It seems that reluctance or lack of predisposition that for one reason or another does not amount to a complete entrapment defense under some circumstances justify a shorter sentence that would be appropriate for a more willing and enthusiastic participant in the same crime. This would be the case whether one views incarceration as serving a primarily retributive or incapacitative purpose. See

> U.S.S.G. ch. 1, pt. A, Introduction, 3 p.s. ('As a practical matter, in most sentencing decisions both [of these] philosophies may prove consistent with the same result').

In United States v. Richardson, 925 F.2d 117 (5th Cir. 1991), the Court noted that if the executive branch had the unilateral power directly and automatically to "ratchet up" a sentence through these means, such power could constitute the sort of threat to the "authority and independence" of the judicial branch that this Court referred to as constitutionally infirm in Mistretta v. United States, 488 U.S. 361 (1989), discussing inter alia delegation of powers concerns under the Sentencing Guidelines procedures.

This practice, then, if permitted to continue, at least without thoughtful guidance from this Court, poses grave

potential threats to a number of constitutional desiderata:

Due process of law is threatened by the arbitrary police power to control and elevate the seriousness of a series of offenses by inaction. United States Constitution, Amendment V.

The separation of powers doctrine is endangered by encroachment upon the judicial function in a manner that transcends any legitimate legislative or executive power. United States Constitution, Article III, Section 1.

The principle of equal protection of the laws is also at risk when law enforcement agencies have the unfettered power to decide which offenders they will arrest promptly and which they will arbitrarily allow to multiply their offenses and thus be exposed to enhanced sentencing. United States Constitution,

Amendment XIV, Section 1.

Even apart from these constitutional notions, however, the importance of rudimentary fairness in the application and enforcement of the criminal laws calls out for this Court's attention to a practice which invites not only abuse of individuals but misuse of judicial and law enforcement resources as well, in instances beyond number.

II. THE DECISION BELOW IS IN CONFLICT WITH THOSE IN OTHER CIRCUITS AS TO THE METHOD OF CALCULATING THE AMOUNT OF LOSS IN FRAUD CASES, AN IMPORTANT QUESTION OF FREQUENT CONCERN FOR ALL TRIAL COURTS, WHO WOULD BE GREATLY ASSISTED BY SETTLEMENT OF THE QUESTION IN THIS COURT.

The computer parts which the petitioners gave in exchange for others had substantial value, but the sentencing judge failed to consider this value in calculating the loss for sentencing purposes, nor did the Court consider pre-

indictment repayment, in violation of the United States Sentencing Guidelines, and inconsistently with the practice in other circuits. Obviously, this, too, is a problem which arises with great frequency in criminal prosecutions, and it is a question in need of and deserving of this Court's attention.

The United States Sentencing Guidelines § 2F1.1, Commentary, Note 7(a) provides:

> Fraud Involving Misrepresentation of the Value of an Item or Product Substitution
>
> A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000.00 and the stock is worth only $10,000.00, the loss is the amount by which the stock was overvalued (i.e. $30,000.00). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the

amount paid by the victim for the product and the amount of which the victim could resell the product received.

And in U.S.S.G. § 6A1.3(a):

> In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Consistent with these provisions, in United States v. Kopp, 951 F.2d 521, 528 (3rd Cir. 1991), the Court noted that:

> The Commentary to Section 2B1.1 focuses significantly on the victim's loss, as well as the perpetrator's gain. ... 'loss' means both harm to the victim and gain to the defendant. ... fraud differs from theft. Mechanical application of theft guideline in fraud cases would frustrate the legislative purpose of the guidelines and contravene the specific language of the Commission. We think it plain that actual harm is generally relevant to the proper

> sentence. The foregoing analysis leads to the conclusion that the fraud guideline defines 'loss' primarily as the amount of money the victim has actually ended up losing at the time of sentencing, not what it could have lost.

Similarly, in United States v. Smith, 951 F.2d 1164 (10th Cir. 1991), the Court also took a different approach where the actual loss bore little relation to the intended loss:

> Our approach thus distinguishes between naked fraudulent takings, and exchanges of property where the wrongdoer merely misrepresents the value of the consideration advanced. Our approach is consistent with the new commentary to Guidelines Section 2F1.1, Guidelines, App. C at 224 (Nov. 1, 1991).... 'In fraudulent loan application cases and contract procurement where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount

> of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan (emphasis added).

Id. at 1167.

And in United States v. Schneider, 930 F.2d 555 (7th Cir. 1991), the Court held that the "loss" calculation must bear some relation to economic reality.

The Eighth Circuit Court in the present case acknowledged these decisions but declined to follow them, saying:

> This circuit recently questioned the reasoning of these three cases, United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992), and reaffirmed our decision in United States v. Edgar, 971 F.2d 89, 93-95 (8th Cir. 1992), which held that "the amount of loss used to increase the offense level under the fraud guideline 'may be either the amount of loss the defendant intended to inflict or the actual loss resulting from the fraudulent conduct, whichever is greater.'" Prendergast, 979

> F.2d at 1292 (citations omitted). In Prendergast, we specifically rejected the suggested definition of "loss" under the fraud guideline as "net loss," or actual harm caused to the victims. Id. at 1292 & n.1.

App. p. 39a; 988 F.2d at 808.

The Court then concluded that the trial judge had followed its decisions in Prendergast and Edgar in refusing to consider either the value of the exchanged items or the pre-indictment repayment. Id.

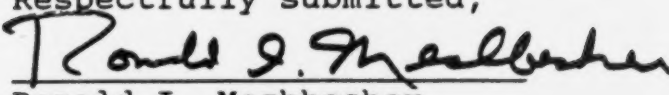
We therefore have a conflict among these circuits on questions of repeated importance, questions which this Court should settle for the benefit of all.

CONCLUSION

For these reasons, the petitioners respectfully request that the petition be

granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1793

United States of America,

Plaintiff-Appellee

v.

Robert August Nelson,

Defendant-Appellant.

No. 92-1794

Appeals from the United States District Court for the District of Minnesota

United States of America,

Plaintiff-Appellee,

v.

Jeffrey Jon Heinen,

Defendant-Appellant.

No. 92-1945

United States of America,

Plaintiff-Appellee,

v.

David Daniel Heinen,

Defendant-Appellant.

No. 92-1945

United States of America,

Plaintiff-Appellee,

v.

Data Hardware, Inc.

Defendant-Appellant.

No. 92-2735

United States of America,

Plaintiff-Appellee,

v.

David D. Heinen,

Defendant-Appellant.

Submitted: October 14, 1992

Filed: March 2, 1993

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

These appeals are from convictions arising from the switching of labels on valuable IBM computer parts called thermoconductor modules or TCMs. Robert August Nelson, Jeffrey Jon Heinen, David Daniel Heinen and Data Hardware, Inc.

appeal from convictions for conspiracy to defraud in violation of 18 U.S.C. § 371 (1988), aiding and abetting mail fraud in violation of 18 U.S.C.A. § 1341 (West Supp. 1992) and 18 U.S.C. § 2 (1988), and aiding and abetting the interstate transportation of property taken by fraud in violation of 18 U.S.C. § 2314 (1988) and 18 U.S.C. § 2. For reversal, they argue that there was insufficient evidence to support their convictions and that the district court made several evidentiary errors, erred in denying severance, and should have granted a mistrial based on remarks the government made in its closing argument. They also claim that their sentencing was unlawful because the district court failed to: correctly calculate the alleged losses involved; recognize a payment made before indictment; acknowledge acceptance of

responsibility; and consider the relative roles in the offense or consider the propriety of a combined sentence. David Heinen also appeals from the district court's modification of sentence, changing a $250,000 fine payable as a condition of supervised release to payable immediately. We affirm the convictions and sentences, but conclude that the district court erred in modifying the payment terms of Heinen's fine.

A TCM is a six inch black box that is the heart or brain of IBM's large mainframe computers. Although TCMs look alike from the outside, their capabilities (and accordingly, their price) vary depending on their microchip circuitry. Each TCM bears an aluminized label stamped with a ten digit alphanumeric serial number, a seven digit part number, and a four letter code. The serial numbers are

unique and allow IBM to track individual TCMs.

IBM sells new TCMs for $50,000 to $140,000. In an effort to stand behind its products, IBM allows its customers to exchange failing TCMs for replacement TCMs on a "like-for-like" basis, that is, the same part number for the same part number. Under this program, a customer could return a failing TCM and receive a new one for $17,000. This program was a way for IBM customers to obtain replacement TCMs, not a way to obtain new TCMs. When a customer brought in a failing TCM for replacement, IBM required the customer to sign an exchange contract identifying the TCM by serial number and certifying that the purpose of the exchange was "to meet an immediate maintenance need."

The transactions giving rise to this case are essentially undisputed. Data

Hardware's business consisted of storing, servicing and refurbishing computers and computer-related equipment, primarily IBM's large mainframe computer systems. From July 15, 1988, through December 14, 1988, Data Hardware took advantage of IBM's exchange program by taking labels from its newer, more expensive TCMs, placing the labels on its older, lower-value TCMs and exchanging the "switched label" TCMs for new TCMs. Under this procedure, Data Hardware received new TCMs for $17,000, instead of paying the usual $50,000 to $140,000 sales price. Data Hardware made 17 "switched label" exchanges and obtained $2,035,000 worth of TCMs.

Data Hardware, David Heinen, its president and sole shareholder, Robert Nelson, its vice president and Jeffrey Heinen, a computer technician who worked

for Data Hardware, were convicted on 17 counts of aiding and abetting mail fraud, 10 counts of aiding and abetting the interstate transportation of goods taken by fraud and one count of conspiracy to defraud. This appeal followed.

I.

Data Hardware[1] first argues that there was insufficient evidence to sustain the convictions because the government failed to prove: (1) criminal intent; (2) that the exchanges deprived IBM of anything of value; (3) that Data Hardware intended to use the mails as part of the alleged fraud; and (4) that the property was obtained by the alleged fraud.

In determining whether the evidence is sufficient to support the convictions,

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[1] We will refer to Data Hardware, David Heinen, Robert Nelson and Jeffrey Heinen collectively as Data Hardware.

we evaluate the evidence in its entirety and in the light most favorable to the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). In reviewing guilty verdicts, we give the government the benefit of all reasonable inferences from the evidence. United States v. Long, 952 F.2d 1520, 1524-25 (8th Cir. 1991), cert. denied, 113 S.Ct. 298 (1992).

Data Hardware argues that the government failed to prove criminal intent. Data Hardware admits that it switched labels from old TCMs to obtain new TCMs for $17,000 but says that it made the exchanges to quickly obtain urgently needed parts. Data Hardware points out that IBM was the only manufacturer of TCMs and that it experienced long delays in obtaining TCMs from IBM's marketing department. Data Hardware relies on the IBM exchange agreement which provided that

the $17,000 exchange price was provisional pending inspection of the TCM and final billing and says that it always intended to pay the full price for what it received.

There was ample evidence from which the jury could find criminal intent. Two former employees testified about conversations in which they heard Nelson talk about "magic at IBM." One former employee overheard Nelson talk about doing some "pulling the wool over IBM's eyes." There was also testimony that Jeffrey Heinen talked about doing "some magic at IBM." Data Hardware's "justification defense" is also refuted by evidence that there were other sources of TCMs. Testimony established that used TCMs were available on the open market, and TCMs could be taken from systems bought or leased. In addition, there was evidence

that when Data Hardware made its last exchange on December 15, Data Hardware had four of the same type TCMs in its inventory, as well as 30 high-value TCMs. Evidence that Data Hardware sold one of the "switched label" TCMs to another company for that company's upgrade work contradicts Data Hardware's claim that it obtained TCMs to avoid penalty clauses in its dealings with upgrade customers.

The jury could have inferred criminal intent from the timing of the transactions. Data Hardware made its first exchange on July 15, 1988. Data Hardware then made a legitimate exchange on July 25. On August 17, IBM sent out the $17,000 invoice for the July 15 exchange, and following receipt of that invoice, Data Hardware made 16 more "switched label" exchanges.

There was evidence from which the jury could infer that Data Hardware did not intend to pay the full sales price for the TCMs. Until Data Hardware was caught, Data Hardware made no effort to repay the difference between the full sales price and the $17,000 exchange contract price. There was testimony that IBM lab personnel and field engineers trusted labels and an IBM engineer testified that Data Hardware's scheme would have worked except for a Data Hardware employee informing the FBI and IBM of the plan.

Testimony showed Data Hardware's attempts to conceal its plan. There was also testimony that Nelson told a Data Hardware employee repayment would be made only if IBM "find[s] out." Data Hardware also obtained TCMs from IBM for the exchange contract price by using a label from a high-value TCM carrying case. To

keep IBM from learning that there were two TCMs with the same serial number, Data Hardware made sure that these TCMs went to customers outside the United States or to companies Data Hardware knew would not turn to IBM for maintenance work. In addition, Data Hardware made sure that one customer would not receive two TCMs with the same serial number. These efforts at concealment are powerful evidence of conscious wrongdoing. See United States v. Dial, 757 F.2d 163, 170 (7th Cir. 1985), cert. denied, 474 U.S. 838 (1985).

Data Hardware contends that the government failed to prove that IBM was harmed or deprived of anything of value. Data Hardware says that IBM's "like-for-like" exchange policy is a red herring. It points out that the actual value of the returned TCMs was irrelevant because the exchange program required only that the

returned TCM be the same type, not that it have any actual value. Data Hardware argues that IBM's true goal was to control the number of TCMs in the market, evidenced by the fact that no true monetary value was at stake in the exchanges.

These arguments ignore the IBM exchange contract which required Data Hardware to identify each TCM returned to IBM by serial number and to certify that "the purpose of this purchase is to meet an immediate maintenance need." Data Hardware does not dispute that it supplied false serial numbers on the exchange contracts. Further, Data Hardware obtained 17 TCMs for $17,000 each, when their actual sales price ranged from $50,000 to $140,000. IBM was deprived of value. We also recognize that the government need not prove actual injury.

"The crime of mail fraud is broad in scope ... condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play." Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 991 (8th Cir. 1989); see also Dial, 757 F.2d at 170 (fraud found despite fact that losses did not materialize).

Data Hardware next argues that it cannot be guilty of mail fraud because the government failed to prove its use or intended use of the mails in furtherance of any fraudulent scheme as required by 18

U.S.C.A. § 1341.[2] Data Hardware argues that the only use of the mails here was IBM's mailing of the $17,000 invoices and that these mailings were not sufficiently linked to the fraud to be covered under the mail fraud statute.

The mail fraud statute does not reach all frauds, only those "'in which the use of the mails is a part of the execution of

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[2] 18 U.S.C.A. § 1341 provides: Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office ... any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon ... shall be fined not more than $1,000 or imprisoned not more than five years, or both....

the fraud.'" Schmuck v. United States, 489 U.S. 705, 710 (1989) (citations omitted). "[T]he use of the mails need not be an essential element of the scheme"--it need only be "'incident to an essential part of the scheme' or 'a step in (the) plot.'" Id. at 710-11 (citations omitted). A mailing may be routine or even sent for a legitimate business purpose so long as it assists in carrying out the fraud. Atlas Pile Driving Co., 886 F.2d at 992. It is not necessary that the defendants actually mail something, only that "they caused it to be done." Pereira v. United States, 347 U.S. 1, 8 (1954); see also United States v. Alanis, 945 F.2d 1032, 1037 (8th Cir. 1991), cert. denied, 112 S.Ct. 906 (1992).

The Supreme Court has considered the mailing requirement on several occasions. In Schmuck, a used car distributor sold

cars with rolled back odometers to car dealers. 489 U.S. at 707. After the car dealers sold the cars, they applied for title, and the government invoked the mail fraud statute on the basis of the title application. Id. The Court held that a rational jury could have found that the title registration mailings were part of the fraudulent scheme. Id. at 712. The Court reasoned that although the mailings may not have directly contributed to the duping of the car dealers or customers, the success of the scheme depended on the successful passage of title. Id.

The Supreme Court concluded that the government failed to prove the mailing requirement in three other cases. In United States v. Maze, 414 U.S. 395 (1974), the Court affirmed the Sixth Circuit's reversal of a mail fraud conviction because the mailings were not

"sufficiently closely related" to the fraudulent scheme. Id. at 399, 402. The defendant in Maze used a stolen bank credit card, and the mailings were merchant and bank invoices. Id. at 396-97. The Supreme Court held that the mailings could not support a mail fraud conviction because the invoices were not "'for the purpose of executing the scheme,'" id. at 400 (quoting Kann v. United States, 323 U.S. 88, 94 (1944)), as the defendant's scheme reached fruition when he received each good or service using the stolen credit card. Id. at 402. In Kann v. United States, the Court held that the mailing of cashed checks to drawee banks could not supply the mailing element as the "persons intended to receive the money had received it irrevocably," and thus, the scheme had "reached fruition" before the mailing

occurred. 323 U.S. at 94. In Parr v. United States, 363 U.S. 370 (1960), the government based some of the charges on the unauthorized use of a credit card, and the mailings were the merchant invoices and the cardholder's mailing of checks for payment. Id. at 393. Relying on Kann, the Court found the mailing element not satisfied, as the scheme reached fruition when the defendants received the goods and services using the credit card, and therefore, the mailings were not for the purpose of executing the scheme. Id. at 393.

The facts before us are analogous to those in Schmuck. A rational jury could have concluded that IBM's mailing of the invoices was incident to an essential part or part of the fraudulent scheme. See Schmuck, 489 U.S. at 710-11; United States v. Ribaste, 905 F.2d 1140, 1142 (8th Cir.

1990) (letter tentatively accepting defendant as a dealer was a necessary step in completion of fraud). Although Data Hardware obtained the TCM before IBM sent the invoice, a jury could find that the scheme was not complete until Data Hardware received the IBM invoice billing Data Hardware the $17,000 exchange contract price instead of the $50,000 to $140,000 sales price. The IBM invoice was more than an accounting copy. It is most telling that Data Hardware did not go forward with its second exchange until it received the invoice for the first exchange showing the success of its scheme.

Finally, Data Hardware claims that to prove conspiracy to commit mail fraud and intentionally transport goods taken by fraud, the government must prove that Data Hardware intended or foresaw mailings as

part of its scheme to defraud. For support, Data Hardware cites United States v. Donahue, 539 F.2d 1131 (8th Cir. 1976). In that case, we explained that to prove conspiracy to violate the mail fraud statute, the government must show that the scheme contemplated the use of the mails. Id. at 1135.

We reject Data Hardware's argument. Although we question the viability of the

requirement in Donahue[3] that conspirators "contemplate the use of the mails," we conclude that the evidence was sufficient to show that the appellants contemplated the use of the mails as part of their

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[3] Although this panel cannot overrule United States v. Donahue, 539 F.2d 1131 (8th Cir. 1976), its requirement that conspirators "contemplate the use of the mails" followed the Sixth Circuit's decision in Blue v. United States, 138 F.2d 351 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944), which was reversed in United States v. Reed, 721 F.2d 1059 (6th Cir. 1983). Like Blue, Donahue may be inconsistent with Pereira, which holds that specific intent to use the mails is not necessary to prove mail fraud so long as use of the mails can be reasonably foreseen. Pereira, 347 U.S. at 9. Although the crime in Pereira was mail fraud, and not conspiracy to commit mail fraud, it follows that to sustain a conspiracy charge, the government need only prove that use of the mails was reasonably foreseen, not actually contemplated. See e.g., Atlas Pile Driving Co., 886 F.2d at 992 (using foreseeability standard).

scheme to defraud.[4] As we have said above, the invoice evidences completion of the process of obtaining an expensive TCM for only the $17,000 exchange price. Further, there was evidence that appellants made a "switched label" exchange on July 15, 1988, and waited until they received the invoice mailing from IBM to continue with their plan. From this, a jury could reasonably infer that the appellants actually contemplated the use of the mails as part of their scheme to defraud. Appellants' argument that they were waiting for IBM's "final bill" (received in March 1989 as part of

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[4] Although appellants couch their argument in terms of insufficiency of the evidence, we observe that the jury instruction did not incorporate the Donahue rule. The record reveals no objection to the instruction given, and the instruction complied with the Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1341 (July 1989).

the settlement of the civil lawsuit) is spurious. The IBM invoices they received for the "switched label" invoices were the same as for all other TCM orders.

II.

Data Hardware next complains about three evidentiary rulings, the district court's failure to sever the trial and the court's failure to grant a mistrial based on the government's closing argument.

A.

Data Hardware and David Heinen argue that the district court erred in admitting Data Hardware's 1988 corporate tax return and Heinen's 1988 W-2 form. They contend that the government offered this evidence only to paint Data Hardware and Heinen as "fat cats," and that the evidence was irrelevant and prejudicial.

Appellate courts leave the balance between relevance and prejudice under

Fed.R.Evid. 403 to the district court. United States v. Lucas, 932 F.2d 1210, 1217 (8th Cir.), cert. denied, 112 S.Ct. 399 (1991). We reverse only if there is an abuse of discretion. Id.

We cannot conclude that the district court abused its discretion in admitting this evidence. The information was relevant to refuting Data Hardware's defense that label switching was the only way to obtain urgently needed TCMs. The corporate tax return demonstrated that Data Hardware had assets of $9,755,213, which consisted primarily of computers. The corporate tax return also confirmed that Data Hardware had a subsidiary, Sovran, which was in the computer leasing business. This evidence showed that Data Hardware had computers from which it could obtain "urgently needed" TCMs. The corporate tax return and Heinen's W-2 form

(reflecting wages of $478,849) showed that Data Hardware and Heinen had the resources to stock TCMs. Further, the evidence was not prejudicial. The district court excluded Data Hardware's consolidated financial statements and Heinen's 1988 personal tax return.

Second, Data Hardware complains that the district court erroneously allowed testimony that David Heinen had falsely reported a burglary as an "insurance scam." This testimony came without objection, and, in fact, defense counsel overrode his co-counsel's efforts to object. A defendant cannot "open the door" and "invite error" through his cross-examination of a prosecuting witness and then seek appellate review. See, e.g., United States v. York, 830 F.2d 885, 892, 93 (8th Cir. 1987), cert. denied, 484

U.S. 1074 (1988). There was no plain error.

Third, Data Hardware urges that the district court abused its discretion by excluding Daniel Berlin's testimony about Data Hardware's justification for label switching. Data Hardware argues this testimony was critical to establishing its good faith defense, particularly because the government was allowed to ask several witnesses whether Data Hardware lacked justification for its actions. The record, however, shows that although the district court initially excluded Berlin's testimony on this point, the judge later changed his mind and allowed it to come before the jury. Thus, Data Hardware's argument lacks merit.

B.

Jeffrey Heinen argues that the district court erred by denying his request for severance. Such a ruling is not a ground for reversal unless clear prejudice and an abuse of discretion are shown. United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992). "We have held on numerous occasions that 'persons charged with a conspiracy will generally be tried together, especially where proof of the charges against each of the defendants is based on the same evidence and acts.'" Id. (quoting United States v. O'Meara, 895 F.2d 1216, 1218 (8th Cir.), cert. denied, 111 S.Ct. 352 (1990)).

Jeffrey Heinen bases his argument on the fact that he was merely a technician and that there was little proof against him. He says that the prejudicial impact is established by the jury's (apparent) initial unanimous determination of not

guilty on all counts.[5] He says that the complexity of the case prevented the jury from compartmentalizing the evidence, and thus severance should have been ordered. The complexity in this case, however, arose from the underlying facts concerning IBM's mainframe computers. The case was not more complex because the trial included three individual defendants and one corporate defendant. "Disparity in the weight of the evidence as between the

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[5] Jeffrey Heinen bases this statement on the fact that during jury deliberations the jury sent a note to the judge that they had reached a verdict. Soon after sending out this note, the jury sent out another note that they were still deliberating and requesting more time. The jury also asked what they should do if they could not reach a verdict. Some three hours later, the jury returned a conviction on all charges against all defendants. Jeffrey Heinen's jury form apparently shows that the jury erased their initial "not guilty" verdicts. The "not guilty" verdicts were, of course, never returned or announced.

[co-conspirators] does not entitle one to severance." Id.

Jeffrey Heinen and Robert Nelson also assert that the district court should have severed their trials when a witness testified about a conversation with David Heinen in which David Heinen blamed the label switching on Nelson. Jeffrey Heinen and Robert Nelson argue that these co-conspirator statements denied them their Sixth Amendment right to confront and cross-examine their accusers under Bruton v. United States, 391 U.S. 123 (1968). The Sixth Amendment issues raised in Bruton, however, concern post-conspiracy statements, id. at 132-37, which are not in issue here. The district court did not abuse its discretion by refusing to sever these appellants' trials.

C.

Appellants contend that certain remarks made by the prosecutor during closing argument deprived them of a fair trial and warrant reversal. They complain that the government improperly criticized defense counsel and vouched for the credibility of government witnesses.

Prosecutors should refrain from personal attacks on defense counsel. United States v. O'Connell, 841 F.2d 1408, 1428 (8th Cir.), cert. denied, 488 U.S. 1011 (1988). Nevertheless, "[i]nappropriate prosecutorial comments, standing alone, [do] not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, ... the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." United States v.

Young, 470 U.S. 1, 11-12 (1985). "The trial court has broad discretion in controlling closing arguments and without a clear showing of abuse, that discretion will not be overturned." United States v. Wesley, 798 F.2d 1155, 1156 (8th Cir. 1986) (quoting United States v. Lewis, 547 F.2d 1030, 1036 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977)).

The "personal attack" appellants complain of concerns the prosecutor's statement that "these defense lawyers have pulled out a lot of tricks to question the credibility of --." The prosecutor did not complete the sentence because of a defense objection. The court immediately reminded the jury that their decision should be based on the evidence and not on "terms and words" used in argument. The prosecutor apologized on the record and reminded the jury "to listen to those

witnesses and assess the truth for yourself." There was no prejudicial error in his statements.

Appellants' second allegation of prosecutorial misconduct centers on allegations that the prosecutor vouched for the credibility of government witnesses. Appellants cite the prosecutor's statement that a government witness "didn't come up here making things up." The record, however, shows that the prosecutor actually said that the government witness "didn't come up here making things up <u>about all these defendants</u>" (emphasis added). This argument asked the jury, when judging the witness's credibility, to consider that the witness did not implicate all four defendants. Such an argument is not improper. Similarly, we have reviewed the other statements pointed to by appellants

and conclude they do not constitute improper statements or amount to prejudicial error.

III.

Appellants attack their sentencing on several grounds. They contend that the sentences were unlawful because the district court failed to: (1) Correctly calculate the values involved; (2) recognize a $1.7 million payment Data Hardware made two years before the indictment; (3) acknowledge acceptance of responsibility; (4) properly consider the relative roles in the offense; and (5) consider the propriety of a combined sentence.

The district court subtracted the $17,000 exchange price from the sales price for each of the switched label TCMs and found that the loss associated with the fraudulent conduct was $1,746,000.

The court thus enhanced the appellants' base offense level by nine levels pursuant to United States Sentencing Commission, Guidelines Manual, § 2F1.1(b)(1)(M) (Nov. 1991). Data Hardware urges that the court failed to correctly calculate the values involved because the "intended loss" bears no relationship to economic reality. Data Hardware says that IBM did not lose money and, in fact, may have gained money. For proof of this point, Data Hardware notes that IBM did not require that the returned TCM have any actual value, and that IBM never returned the exchanged TCMs, which had values of at least $5,000 to $10,000 each to Data Hardware.

Data Hardware contends that the district court's failure to place a value on the returned TCMs and credit this to Data Hardware's loss amount conflicts with

U.S.S.G. § 2F1.1, comment. (n.7(a)), which provides:

> A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

Data Hardware goes on to argue that the district court's failure to recognize the economic realities of IBM's alleged losses conflicts with other circuit court decisions. Data Hardware points out that the Third Circuit in United States v.

Kopp, 951 F.2d 521 (3rd Cir. 1991), distinguished fraud and theft losses and observed that under the fraud guideline, "loss" is defined "primarily as the amount of money the victim has actually ended up losing at the time of sentencing, not what it could have lost.[6]" Id. at 531, 536. Data Hardware also cites United States v. Smith, 951 F.2d 1164 (10th Cir. 1991), and United States v. Schneider, 930 F.2d 555 (7th Cir. 1991). In Smith, the Tenth Circuit distinguished "naked fraudulent takings and exchanges of property where the wrongdoer merely misrepresents the value of the consideration advanced." 951 F.2d at 1167. The court concluded that "if the fraud consists of an unequal

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[6] We note that United States v. Kopp, 951 F.2d 521 (3rd Cir. 1991), also pointed out that "loss" should be revised upward to the loss that defendant intended to inflict, if that amount is higher than actual loss. Id. at 536.

exchange of property," net value is used to measure loss. Id. The Seventh Circuit reached the same conclusion in Schneider, 930 F.2d at 557-59. This circuit recently questioned the reasoning of these three cases, United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992), and reaffirmed our decision in United States v. Edgar, 971 F.2d 89, 93-95 (8th Cir. 1992), which held that "the amount of loss used to increase the offense level under the fraud guideline 'may be either the amount of loss the defendant intended to inflict or the actual loss resulting from the fraudulent conduct, whichever is greater.'" In Prendergast, we specifically rejected the suggested definition of "loss" under the fraud guideline as "net loss," or actual harm caused to the victims. Id. at 1292 & n.1.

The district court's factual findings as to the amount of loss are reversible only for clear error. United States v. Morton, 957 F.2d 577, 580 (8th Cir. 1992). We cannot conclude that the district court clearly erred in calculating the loss. Indeed, the loss calculation was consistent with our decisions in Edgar and Prendergast. In addition, Data Hardware's argument that the loss calculation does not reflect "economic reality" ignores the realities of IBM's marketing and business philosophies. Simply put, IBM did not buy or want used TCMs. IBM took used TCMs pursuant to its exchange program. This is vastly different from a false loan application situation in which a bank ordinarily could, and would, sell the underlying collateral. See United States v. Johnson, 908 F.2d 396, 398 (8th Cir. 1990) (holding that the district court did

not err in refusing to reduce loss amount by amount recouped by sale of collateral). Likewise, the district court's failure to reduce the loss by the $1.7 million restitution payment is not a ground for finding a sentencing error. A subsequent recovery of funds does not diminish the dollar amount applicable in sentencing. Sentencing may be based on "the possible loss the defendant attempted to inflict." Prendergast, 979 F.2d at 1292.

Appellants also assert that sentencing entrapment compels a downward departure in their sentences. They point out that IBM and the government knew about the first mislabeled TCM in July 1988, and the loss would have been far less if the government had brought it to a halt in the early stages.

In United States v. Lenfesty, 923 F.2d 1293 (8th Cir.), cert. denied, 111

S.Ct. 1602 (1991), this Court acknowledged that sentencing entrapment may be a valid consideration when "outrageous official conduct overcomes the will of an individual predisposed only to dealing in small quantities." Id. at 1300. In United States v. Stuart, 923 F.2d 607 (8th Cir.), cert. denied, 111 S.Ct. 1599 (1991), we considered an argument analogous to appellants'. In Stuart, the defendant argued that the government's front of money to purchase a larger quantity of drugs than that which he had the means to pay, entrapped him into committing an offense greater than that which he was predisposed to commit. Id. at 613-14. The defendant argued that although he was predisposed to commit a minor offense, he was entrapped into committing a greater offense subject to greater punishment under the sentencing

guidelines. Id. at 614. We explained that accepting this argument would require us to "abandon [our] long-established rule of entrapment which focuses on the predisposition of the defendant to commit crime." Id.

We are concerned with the government conduct in this case. It seems that there was no legitimate reason for this scheme to continue as long as it did. Obviously, the longer the scheme continued, the higher the losses, and the longer the sentences. Nevertheless, appellants make no argument which compels a conclusion that they were not predisposed to commit these offenses. Indeed, the facts refute

such an argument.[7] Accordingly, we cannot conclude the district court erred in calculating the losses or sentencing.

Data Hardware's final two sentencing arguments merit little discussion. All appellants argue that they are entitled to a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. The sentencing transcripts show that the district court did not clearly err in refusing a downward departure based on

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[7] The Fifth Circuit discussed the possibility of the government's "ratchet[ing] up" a sentence in a money laundering scheme in United States v. Richardson, 925 F.2d 112 (5th Cir.), cert. denied, 111 S.Ct. 2868 (1991). The Fifth Circuit explained that a due process or separation of powers violation could occur in circumstances involving the executive branch's "unilateral power to directly and automatically ratchet up a sentence" based on the "amount of money that undercover agents bring to the table in a 'sting' operation." Id. at 117. No improper executive action occurred here, however, as the appellants' conduct established the amount of money paid and the duration of the scheme.

acceptance of responsibility. The district court decided not to make a downward adjustment for David Heinen observing that Heinen "continue[s] to maintain innocence." The court also rejected Nelson's request for a downward departure, observing that Nelson "failed to meet with the probation officer," and "denied criminal conduct, insisting that he engaged only in a 'deceptive practice and a sharp business practice.'" The court rejected Jeffrey Heinen's request for similar reasons, noting that Jeffrey Heinen continues to allege that he had an "insignificant" role in the scheme, despite his conviction. The appellants' admission that they switched the labels and made restitution to IBM does not necessarily translate into a finding of acceptance of responsibility.

Likewise, we reject Jeffrey Heinen and Robert Nelson's argument that the district court should have decreased their offense levels for minimal and minor roles. Determinations of role are fact questions reviewed under the clearly erroneous standard. United States v. Streeter, 907 F.2d 781, 787 (8th Cir. 1990). Jeffrey Heinen received a two-level reduction for his minor role. He contends that his offense level should have been decreased another two levels for a minimal role. Although the evidence showed that Jeffrey Heinen's role was different than the others, he nevertheless played an integral part in the charged scheme. The district court did not err in denying Heinen a "mitigating role" reduction merely because others in the scheme were more culpable. See, e.g., United States v. West, 942 F.2d 528, 531

(8th Cir. 1991). Here, Jeffrey Heinen admitted that he switched labels on several occasions. Similarly, the court's failure to depart based on Nelson's role is fully supported by the record. Nelson, a vice-president, had a significant role in the scheme.

David Heinen attacks his $250,000 fine, arguing that the court failed to consider a combined sentence as required by the U.S.S.G. § 5E1.2(d)(1)-(4), and 18 U.S.C. § 3572. He argues that the fine is excessive, particularly in light of a $2.7 million guaranty executed by himself and his wife for the benefit of Data Hardware and the restitution payment made to IBM.

We reject Heinen's argument. Heinen does not dispute the district court's assessment of his net worth at $1,258,113.65. The personal guaranty covers the value of computer assets and

may not be enforced. The district court found that Heinen has the ability to pay the fine, and we conclude that finding is not clearly erroneous. Cf. United States v. Walker, 900 F.2d 1201, 1205-06 (8th Cir. 1990).

V.

In a separate consolidated appeal, David Heinen appeals from the district court's modification of sentence. The district court held Heinen's sentencing on April 17, 1992. After imposing a 30 month prison sentence, the district court stated:

> It is further the order of the Court that the period of imprisonment will be followed by a three year period of supervised released, [sic] subject to the following conditions: That you abide by the standard conditions of supervised release as recommended by the Sentencing Commission; that you own or possess no guns or dangerous weapons; that you commit no

> crimes, federal, state or local; and that you pay a fine in the sum of $250,000. It is further ordered that you pay immediately a special assessment in the sum of $1,400.

The April 17 judgment order similarly provided under the captions "SUPERVISED RELEASE," that "[u]pon release from imprisonment, the defendant shall be on supervised release for a term of [three years] and ... Defendant shall pay a fine of $250,000.00." Judgment at 3. The judgment also provided on the next page under the caption "FINE," that "defendant shall pay a fine of $250,000," and x's were placed in boxes so as to waive the interest requirement, and provide for the fine to "be paid ... in installments as set by [the] Probation Office." Id. at 4.

On April 22, the district court amended its judgment, leaving unchanged the provisions under the caption

"SUPERVISED RELEASE," and changing only the next page under the caption "FINE," by placing an "x" in the box before the word "in full immediately," instead of the box indicating installment payments. Amended Judgment at 4. The district court entered the amended judgment without notice to Heinen or his counsel and without holding a hearing.

On July 16, 1992, Heinen filed a motion to vacate the amended judgment and reinstate the original judgment and for a stay of execution of the fine. The district court granted the stay but conditioned it on Heinen's deposit of $250,000 cash or security bond. United States v. Heinen, No. 3-91-25(2) (D. Minn. July 21, 1992) (Order). On July 30, 1992, the district court lifted the stay and authorized the government to collect the fine because of Heinen's failure to

deposit the bond. Heinen filed a notice of appeal on July 30, 1992.

Rule 36 of the Federal Rules of Criminal Procedure provides for the correction of "clerical mistakes" arising from "oversight or omission." Rule 25(c) provides for correction of a sentence "that was imposed as a result of arithmetical, technical, or other clear errors." Fed.R.Crim.P. 35(c). Rules 32 and 43 provide for the defendant's right to be present when a sentence is imposed or modified, and Rule 32.1(b) requires "[a] hearing and assistance of counsel ... before the terms of supervised release can be modified."

The government says that the district court properly corrected a clerical mistake and that no hearing or notice was required. The government states that the amended judgment did not represent a

change in the district court's ruling from the sentencing hearing. The government contends the district court placed the corporate fine on an installment plan but made no similar provision for Heinen's individual fine, and thus, the district court made a clerical error in placing the individual fine on an installment plan. We do not so read the sentencing transcript. The court fined Data Hardware $500,000 and authorized the Probation Office to establish a payment schedule for Data Hardware. The payment schedule was ordered based on arguments of both the government and Data Hardware as to the effect a corporate fine would have on Data Hardware's continuing viability. It is true that there was no such discussion about placing Heinen's fine on an

installment basis.[8] Indeed, the

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[8] The sentencing transcript reveals some confusion between the government and the court as to the payment terms of the personal and corporate fines:

[ASSISTANT U.S. ATTORNEY]: And in addition to that, we feel it's also appropriate for David Heinen, the real person who wanted to gain by this crime, to pay a financial penalty for this crime, because it's that's [sic] kind of a financial penalty that will also deter this crime in the future.

THE COURT: As I understand it, you are suggesting to the Court that the defendant be placed on probation for a period of years, and that as a special condition of the probation, there would be a fine of a certain amount? Is that your suggestion to the Court?

[ASSISTANT U.S. ATTORNEY]: That's correct. It would be characterized as a fine, but you would impose a fine, but the fine would be made a condition of probation, allowing the option of both installment payments and modification of that condition of probation as the probation term goes on. And then yourself or Jay Meyer or whoever else can take a look at how this company is doing a year or two from now. I just do not believe that the jury's verdict entitles the corporation to stand here and because they have sincerely switched management to say that there should be no fine whatsoever.

THE COURT: Very well.

sentencing transcript and the judgment consistently order Heinen's fine as a condition of supervised release, and even the amended judgment so provides. The district judge in the sentencing proceedings explicitly provided that the period of imprisonment "will be followed" by supervised release subject to certain conditions, including payment of the fine. The written judgment entries, both in original form and as amended, provided that "[u]pon release from imprisonment, the defendant shall be on supervised release for a term of [three years]," with one of the conditions being the payment of the fine. The language is explicit that the fine comes after release from imprisonment. The language could not be more clear. The only change in the amended judgment is the removal of the "x" from the box that provides for the payment

of the fine in installments and placement of an "x" in the box that provides for the fine to be paid "in full immediately." It can be argued that both the original judgment and the amended judgment have some inconsistencies that could be clarified, but no effort is made in the amended judgment to do so. The only change in the amended judgment is to make the fine payable immediately. We entertain no doubt that requiring payment of the fine immediately as opposed to in installments, is a change of substance, and is not the correction of a clerical error. Payment of $250,000 now is quite different from payment three years from now. The government's argument does not explain the actions taken or prove that the change was merely a minor clerical correction. Heinen was, therefore, entitled to notice and a hearing before

the district court ordered the amendment to his judgment. Accordingly, we reverse the amended judgment, and order that the original judgment be reinstated. See United States v. Warden, 705 F.2d 189, 191 (7th Cir. 1983) (vacating district court's extension of probation ordered without notice or hearing). We order the United States to repay the $250,000 fine David Heinen paid under the order we now reverse.

The government also responds that this court lacks jurisdiction because of a defective notice of appeal. The government urges that Heinen's appeal from the July 21 order puts only that order in issue. We reject this argument. The July 21 order effectively denied the motion to vacate the amended judgment. Obviously, Heinen was not appealing from the court's grant of the stay.

The government also claims that Heinen has waived his right to challenge the amended judgment. The government says that Heinen waited three months to bring a motion to vacate the amended April 22 judgment making the fine due immediately. The government also contends that Heinen has "unclean hands," alleging that Heinen and his wife are trying to move assets beyond the government's reach. These issues have little to do with the amendment to judgment, and further demonstrate the need for the district court to provide notice and a hearing to Heinen before changing the terms of his judgment.

We affirm the convictions and sentences. We reverse the district court's order amending David Heinen's judgment, and remand with directions that the original judgment be reinstated, and

that the United States pay $250,000 to David Heinen.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT

THIRD DIVISION DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

V.

DAVID DANIEL HEINEN

AMENDED AMENDED AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: Cr. 3-91-25(2)

Ronald Meshbesher
Defendant's Attorney

THE DEFENDANT: AMENDED AMENDED AMENDED

Was found guilty on count(s) One through Twenty Eight after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
(1) 18 USC 371	(1) Conspiracy to defraud.
(2) 18 USC 1341 and 2	(2) Aiding and abetting mail fraud on seventeen occasions.

(3) 18 USC 2314 and 2	(3) Aiding and abetting in interstate fraud on ten occasions.

(the following columns coincide with the above-listed columns)

Date Offense Concluded	Count Number(s)
1-18-89	1
12-14-88	2-18
1-18-89	19-28

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $1,400, for count(s) one through twenty eight, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

April 22, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

ROBERT G. RENNER, Judge
United States District Court
Name & Title of Judicial Officer

April 22, 1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS on each of Counts 1-28 to be served concurrently with each other.

COURT ORDERS no costs of imprisonment or supervision be paid by defendant because of financial condition.

The court makes the following recommendations to the Bureau of Prisons:

1. Confinement in the FPC in Duluth, Minnesota.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

If no institution designated by May 25, 1992, defendant shall surrender to U.S.

Marshal in Minneapolis, MN by 10:00 a.m. that date.

CERTIFIED ORIGINAL AND TRUE COPY IN 5 PAGES.

DATED: April 22, 1992

BY: _____
Deputy Clerk

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts 1-28 to be served concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not legally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

2. The defendant shall not possess a firearm or destructive device.

3. Defendant pay a fine of $250,000.00

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities.

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal

history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $250,000.00.

The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

The interest requirement is waived.

This fine plus any interest required shall be paid:

In full immediately.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Defendants evidentiary hearing held on objections and DENIED.

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years.

Fine Range: $6,000 to $3,492,000

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT

THIRD DIVISION DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

V.

ROBERT AUGUST NELSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: Cr. 3-91-25(3)

Phillip S. Resnick
Defendant's Attorney

THE DEFENDANT:

Was found guilty on count(s) One through Twenty Eight of Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
(1) 18 USC 371	(1) Conspiracy to defraud.
(2) 18 USC 1341 and 2	(2) Aiding and abetting mail fraud on seventeen occasions.

(3) 18 USC 2314 and 2	(3) Aiding and abetting in interstate fraud on ten occasions.

(the following columns coincide with the above-listed columns)

Date Offense Concluded	Count Number(s)
1-18-89	1
12-14-88	2-18
1-18-89	19-28

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $1,400, for count(s) one through twenty eight, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

April 3, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

ROBERT G. RENNER, Judge
United States District Court
Name & Title of Judicial Officer

April 3, 1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-FOUR (24) MONTHS as to each of 28 Counts. Prison Sentences to run concurrently with each other.

COURT ORDERS no fine or costs of imprisonment or supervision to be paid by this defendant because of financial condition.

The court makes the following recommendations to the Bureau of Prisons:

1. Confinement in the FPC in Duluth, Minnesota.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

If no place of confinement is designated by May 5, 1992, defendant shall surrender to the U.S. Marshal in Minneapolis, Minnesota by 10:00 a.m. that date.

CERTIFIED ORIGINAL AND TRUE COPY IN 4 PAGES.

DATED: April 3, 1992

BY: _____
Deputy Clerk

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to each of 28 Counts. Sentences to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not legally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities.

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia

related to such substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Defendant's objections are placed on record and Denied by Court.

Guideline Range Determined by the Court:

Total Offense Level: 17

Criminal History Category: I

Imprisonment Range: 24 to 30 months

Supervised Release Range: 2 to 3 years.

Fine Range: $5,000 to $3,492,000

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT

THIRD DIVISION DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

V.

JEFFREY JON HEINEN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: Cr. 3-91-25(4)

Charles Hawkins
Defendant's Attorney

THE DEFENDANT:

Was found guilty on count(s) One through Twenty Eight after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
(1) 18 USC 371	(1) Conspiracy to defraud.
(2) 18 USC 1341 and 2	(2) Aiding and abetting mail fraud on seventeen occasions.

(3) 18 USC 2314 and 2	(3) Aiding and abetting in interstate fraud on ten occasions.

(the following columns coincide with the above-listed columns)

Date Offense Concluded	Count Number(s)
1-18-89	1
12-14-88	2-18
1-18-89	19-28

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $1,400, for count(s) one through twenty eight, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

March 30, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

ROBERT G. RENNER, Judge
United States District Court
Name & Title of Judicial Officer

March 30, 1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTEEN (18) MONTHS on each of Counts 1-28. Prison sentence as to each count to be served concurrently with each other.

COURT ORDERS no fine or costs of imprisonment or supervision be paid by this defendant.

The court makes the following recommendations to the Bureau of Prisons:

1. Confinement in the FPC in Duluth, Minnesota.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

If no institution designated by May 5, 1992, defendant to surrender to U.S.

Marshal in Minneapolis, MN by 10:00 a.m. that date.

CERTIFIED ORIGINAL AND TRUE COPY IN 4 PAGES.

DATED: March 30, 1992

BY: _____
Deputy Clerk

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts 1-28 to be served concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not legally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities.

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Defendants Objections to PSI are DENIED.

Guideline Range Determined by the Court:

Total Offense Level: 15

Criminal History Category: I

Imprisonment Range: 18 to 24 months

Supervised Release Range: 2 to 3 years.

Fine Range: $4,000 to $40,000

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $N/A

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-1793MNST
No. 92-1794MNST
No. 92-1945MNST

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Robert Nelson, Jeffrey Heinen, David Heinen,	*	Suggestion for Rehearing En Banc
	*	
Appellants.	*	

The suggestion for rehearing is denied. The Petition for rehearing is also denied.

April 12, 1993

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
SEP 9 1993
OFFICE OF THE CLERK

(2)

No. 93-71

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT AUGUST NELSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
KRISTINA L. AMENT
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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17 pp

QUESTIONS PRESENTED

1. Whether the government engaged in sentencing entrapment.

2. Whether the district court erred in calculating the amount of loss resulting from petitioners' fraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-71

ROBERT AUGUST NELSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 988 F.2d 798.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1993. A petition for rehearing was denied on April 12, 1993. Pet. App. 81a. The petition for a writ of certiorari was filed on July 12, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioners were convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; 17 counts of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341; and ten counts of interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314. Petitioner Jeffrey Heinen was sentenced to 18 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner Robert Nelson was sentenced to 24 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner David Heinen was sentenced to 30 months' imprisonment, to be followed by a three-year term of supervised release, and he was fined $250,000. Petitioner Data Hardware, Inc. (DHI) was sentenced to three years' probation and a $500,000 fine.

1. Petitioner DHI was in the business of storing, servicing, and refurbishing computers and computer-related equipment, primarily IBM's large mainframe computers. Petitioner David Heinen was the sole shareholder and president of DHI. Petitioner Nelson worked as DHI's vice-president. Petitioner Jeffrey Heinen worked as a computer technician at DHI. Gov't C.A. Br. 4.

Petitioners engaged in a fraudulent scheme to acquire new and expensive IBM computer parts called thermoconductor modules (TCMs) for a fraction of their value. A TCM is the "heart" or "engine" that drives IBM's large mainframe computers. Although all TCMs look alike, their capabilities and prices vary depending on their internal microchip circuitry. New

TCMs of the type involved in this case range in price from $50,000 to $140,000. To keep track of TCMs that it manufactures, IBM affixes to the outside of each TCM an aluminized label with a unique identification number. Gov't C.A. Br. 4-5.

IBM had a program under which it would exchange failing TCMs for replacement ones for a price of $17,000. As the result of its maintenance and refurbishing work, DHI possessed a large number of outdated TCMs with little market value. To take advantage of the IBM exchange program, petitioners devised a scheme to exchange its low-valued TCMs for new, high-valued TCMs. Petitioners would switch the labels on older TCMs it owned with the labels on newer, more sophisticated models that it also owned. The falsely labeled TCMs would then be taken to the IBM Parts and Distribution Center to make what appeared to be a like-for-like exchange. In fact, however, petitioners would receive a valuable TCM matching the part type identified on the fake label in return for its outdated TCM. As part of each transaction, petitioners signed an exchange agreement with IBM misrepresenting the part numbers and serial numbers of the TCMs they were exchanging. Petitioners also certified that they were engaging in the exchange to satisfy an immediate maintenance need. Gov't C.A. Br. 4-6.

From July 15, 1988, through December 14, 1988, petitioners traded 17 falsely labeled TCMs for new units with higher values. The value of the state-of-the-art TCMs petitioners acquired through the scheme was over $2 million. Gov't C.A. Br. 1, 6-8. Unbeknownst to petitioners, their scheme had been reported to the FBI in July 1988 by a DHI employee. With the employee's assistance and IBM's coopera-

tion, the FBI investigated the case and ultimately ended the fraud when it executed a search warrant at DHI's headquarters on December 14, 1988. *Id.* at 1.

2. In sentencing petitioners, the district court was required to determine the amount of loss caused by petitioners' fraudulent conduct. In making that determination, the district court subtracted the $17,000 per unit exchange price from the $2,035,000 aggregate retail value of the 17 fraudulently acquired TCMs, leaving a loss attributable to petitioners of $1,746,000. In calculating the loss, the district court declined to credit petitioners with a $1,746,000 payment made to settle a civil suit brought by IBM. Gov't C.A. Br. 67. The court accordingly increased petitioners' base offense level by nine levels as required by the version of the Sentencing Guidelines in effect at the time of petitioners' crimes. See Sentencing Guidelines § 2F1.1(b)(1)(J) (1988) (nine levels added for losses stemming from fraud between $1 million and $2 million).

3. On appeal, petitioners argued that they had been the victims of sentencing entrapment, and that as a result the sentencing court should have departed downward from their Guidelines sentencing range. They argued that the government was aware of their scheme in July 1988 but did not stop it until December 1988, and that the government delayed uncovering the scheme in order to manipulate the severity of their sentences. The court of appeals acknowledged that sentencing entrapment may be a valid consideration when "outrageous official conduct overcomes the will of an individual predisposed only" to committing small-scale crimes. Pet. App. 42a (quoting *United States* v. *Lenfesty*, 923 F.2d 1293, 1300 (8th Cir.), cert. denied, 499 U.S. 968 (1991)). The court of appeals held

that in order to prove sentencing entrapment, a defendant would have to show a lack of predisposition to commit the greater offense. Although the court expressed concern over the government's delay in stopping petitioners' scheme, it concluded that petitioners "make no argument which compels a conclusion that they were not predisposed to commit these offenses. Indeed, the facts refute such an argument." Pet. App. 43a-44a. The court accordingly held that no sentencing entrapment occurred in this case.

The court of appeals also held that the district court did not clearly err in calculating the amount of loss resulting from petitioners' scheme. The court concluded that under the Sentencing Guidelines, the amount of loss stemming from fraud is either the amount of loss the defendant intended to inflict or the actual loss resulting from the fraudulent conduct, whichever is greater. Pet. App. 38a-39a (citing *United States* v. *Edgar*, 971 F.2d 89, 93-95 (8th Cir. 1992)). The court of appeals also rejected petitioners' contention that Sentencing Guidelines § 2F1.1, Application Note 7(a) (1992) required a different calculation. That Note provides that "[i]n a case involving misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received." Because TCMs are not consumer goods, and the transactions involved in this case were not consumer transactions, the court of appeals concluded that this commentary was inapposite. It reasoned that IBM's exchange program was intended to serve customers rather than to obtain used TCMs. Pet. App. 40a.

Finally, the court of appeals rejected petitioners' contention that the $1.7 million payment made by DHI to IBM in settlement of IBM's civil suit should be deducted from the loss amount. The court concluded that "[a] subsequent recovery of funds does not diminish the dollar amount applicable in sentencing. *Sentencing may be based on 'the [amount of] possible* loss the defendant attempted to inflict.'" Pet. App. 41a (quoting *United States* v. *Prendergast*, 979 F.2d 1289, 1292 (8th Cir. 1992)).

ARGUMENT

1. Petitioners contend (Pet. 11-18) that the government engaged in sentencing entrapment by waiting to stop petitioners' fraudulent scheme until after they had engaged in 17 transactions involving a large sum of money so as to increase the length of their sentences.

The FBI became aware of petitioners' scheme in July 1988, around the time of the first exchange of falsely labeled TCMs. Instead of interrupting the unlawful scheme at that point, the FBI continued to investigate with the cooperation of IBM and the DHI employee who first revealed the plot. The scheme continued until the government executed the search warrant at DHI in December 1988. By that time, petitioners had engaged in 17 fraudulent transactions.

Petitioners claim that the government delayed interrupting their scheme in order to enable them to commit more crimes so that they would be exposed to more severe sentences. That delay, according to petitioners, violated the separation of powers doctrine and due process. Even if petitioners were correct that government manipulation of a defendant's conduct with the result that the defendant receives a

more severe sentence might in some circumstances raise constitutional concerns, no such circumstances are present in this case.

According to petitioners, sentencing entrapment occurs when a defendant is predisposed to commit a minor offense, but the government induces him to commit a greater one. See *United States* v. *Dickey*, 924 F.2d 836, 839 (9th Cir.), cert. denied, 112 S. Ct. 383 (1991); *United States* v. *Stuart*, 923 F.2d 607, 614 (8th Cir.), certs. denied, 499 U.S. 967 and 112 S. Ct. 145 (1991). Although several courts of appeals have discussed the doctrine, no court has found that such entrapment occurred on the facts before it. See *United States* v. *Connell*, 960 F.2d 191, 195 (1st Cir. 1992); *Stuart*, 923 F.2d at 614; *Lenfesty*, 923 F.2d at 1300; *United States* v. *Streeter*, 907 F.2d 781, 786-787 (8th Cir. 1990); *Dickey*, 924 F.2d at 839.

As in previous cases, the facts here cannot support a finding that the government manipulated the scope of petitioners' crimes for the purpose of increasing petitioners' sentences. In this case, the government took no action that induced petitioners to commit *any* offense, much less a greater one than they otherwise would have committed. Unlike the cases in which sentencing entrapment has been discussed as a possibility, which typically involve sting operations in which a government agent or informant has a role in the defendant's crime, the government had no part whatever in petitioners' criminal scheme. Petitioners could have halted their scheme at any time; no government actor in any way encouraged them to go forward.

The facts here contrast sharply with the facts in other cases in which sentencing entrapment claims have been made. For example, in *Lenfesty* a govern-

ment agent made nine drug purchases from three dealers within the same organization. 923 F.2d at 1295. The government agent therefore provided some inducement to the defendants to continue their illegal course of conduct. Similarly, in *Stuart* government agents provided the defendant with the funds that allowed him to purchase a larger quantity of drugs than he otherwise would have been able to buy. 923 F.2d at 610. Notwithstanding the government's role in those cases in encouraging the criminal conduct and in determining the scope of that conduct, the courts did not find sentencing entrapment. The same result follows here, where the government did nothing to encourage petitioners in their criminal conduct.

Petitioners rely on the Fifth Circuit's decision in *United States* v. *Richardson*, 925 F.2d 112, cert. denied, 111 S. Ct. 2868 (1991). That case involved a challenge to a sentence for a money laundering conviction that was based upon the amount of money a government agent had provided to the defendant. The court concluded that no government misconduct had occurred, although it agreed that it might implicate separation of powers principles if the Executive Branch "had the unilateral power to directly and automatically rachet up a sentence" by manipulating the amount of money the defendant laundered. 925 F.2d at 117. The court concluded, however, that "the district court clearly retained the authority" to sentence the defendant based on the amount of money it believed was legitimately part of the defendant's scheme. *Ibid.*

Even if the concerns expressed by the court in *Richardson* would support reducing a sentence in some case, those principles have no application here.

In this case, no government actor ratcheted up petitioners' sentence by giving them access to more money or encouraging them to engage in more widespread criminal conduct than they otherwise would have. In fact, each of the 17 transactions in which petitioners voluntarily engaged—without any governmental role—constituted discrete crimes. The government was entitled to continue its investigation while those crimes occurred to determine the nature and scope of petitioners' conspiracy and to gather the evidence necessary to prove petitioners' guilt. A defendant should not escape or minimize the punishment for his crimes simply because the government failed to stop him from committing them.

2. Petitioners contend (Pet. 18-23) that the district court erred in calculating the amount of the loss attributable to their fraud.

Petitioners argue that the mislabeled TCMs (which IBM retained) were not worthless, and that their value thus should have been subtracted from the loss amount calculated by the district court. They also argue that their $1.7 million payment to IBM in settlement of a civil suit should have been deducted from the loss amount. If those deductions had been made, the amount of loss attributable to the fraud in this case would have been zero. Petitioners' contentions are without merit.

A district court's calculation of loss in a fraud case is reviewable only for clear error. *United States* v. *Smith*, 951 F.2d 1164, 1166 (10th Cir. 1991); *United States* v. *Haddon*, 927 F.2d 942, 952 (7th Cir. (1991); *United States* v. *Davis*, 922 F.2d 1385, 1387-1388 (9th Cir. 1991). In this case, the record amply supports the district court's conclusion that IBM stood to lose—and petitioners stood to gain—the entire purchase

price of the high-valued TCMs less the $17,000 payment petitioners made for each. There was no ready market for the low-valued TCMs that petitioners forced upon IBM. And petitioners delivered those TCMs to IBM on the explicit representation that they were failing. Nor was it error for the district court to refuse to credit petitioners with restitution payments made to IBM in settlement of a civil suit.[1] Petitioners cite no authority for the proposition that such a payment should be viewed as reducing their culpability for their crimes. In short, the district court's figure of $1,746,000 was a reasonable judgment about the actual and intended loss resulting from petitioners' scheme, even though IBM subsequently recouped all of that loss through collateral proceedings.

Petitioners contend (Pet. 20-23) that the decision in this case conflicts with the decisions in *United States* v. *Kopp*, 951 F.2d 521 (3d Cir. 1991); *United States* v. *Smith*, 951 F.2d 1164 (10th Cir. 1991); and *United States* v. *Schneider*, 930 F.2d 555 (7th Cir. 1991). That contention is incorrect.

The cases relied on by petitioners applied the same general legal analysis used by the court of appeals in this case, but involved distinct factual circumstances leading to a different result. Two of the cases involved fraudulent misrepresentations made to obtain real estate loans. The courts in those cases concluded that the actual out-of-pocket costs to the lenders should be the relevant measure because the

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[1] Although petitioners emphasize (Pet. 8, 18-19) that the payment was made two years before they were indicted, they do not mention that it was made after their scheme had been exposed and in settlement of IBM's civil suit.

loans were secured by the value of the property regardless of the defendant's misstatements. See *Kopp*, 951 F.2d at 525; *Smith*, 951 F.2d at 1166. The third case involved fraudulent misrepresentations in bids for government contracts, and the court concluded that the measure of loss should be the costs to the government of procuring a different contractor rather than the gross amount of the contracts. *Schneider*, 930 F.2d at 557-558. Because the contracts at issue might have been performed despite the fraud in procuring them, the gross value of the contracts did not bear any relationship to the losses incurred by the defrauded party. *Ibid.*

Although the cases petitioners rely upon measured loss by reference to the victim's actual losses, their legal analysis is consistent with that of the court of appeals in this case. Thus, each case relied upon by petitioners recognized—as the court of appeals did in this case—that as a general matter the greater of actual or intended loss should be the relevant measure. See *Kopp*, 951 F.2d at 529; *Smith*, 951 F.2d 1166; *Schneider*, 930 F.2d at 558.[2] Here, there is every

[2] Even if petitioners were correct in contending that the circuits are in conflict, this case nonetheless would not warrant review. If, as petitioners urge, they had been credited with the value of the failing TCMs, their sentencing range would have been the same. Under the version of the fraud Guideline then in effect, losses of between $1 million and $2 million called for a nine-level increase in the defendant's offense level. The mislabeled TCMs IBM took possession of had a market value of up to $10,000 each (Gov't C.A. Br. 5), which would amount to a $170,000 total credit for the 17 TCMs. If that amount had been deducted from the district court's $1,746,000 loss figure, the amount of losses attributable to petitioners would still have been between $1 million and $2 million. Their offense level therefore would not have been different.

reason to use intended loss as the measure, because IBM stood to lose the full $1.7 million if petitioners' scheme succeeded.

Moreover, the question raised by petitioners is one of Guidelines administration that is readily resolved by the Sentencing Commission in the ordinary course of its business. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991). In fact, the Sentencing Commission has recognized that a different loss measure may be appropriate in cases in which the threatened losses to the defrauded party do not accord with the defendant's potential gain. In amendments to the Guidelines commentary, the Sentencing Commission has recognized that such circumstances justify a different approach to loss calculation than the normal approach of relying on the greater of actual or intended losses. See Sentencing Guidelines § 2F1.1, Application Note 7(b) (1992) ("In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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